IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 530

UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATIONS, UAW-CIO,

Appellant,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD and KOHLER CO., a Wisconsin corporation,

Appellees.

BRIEF FOR THE STATE OF UTAH AND THE STATE OF GEORGIA AS AMICUS CURIAE

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

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PRELIMINARY STATEMENT

This brief *amicus curiae* is submitted by the State of Utah and the State of Georgia pursuant to Rule 42 (4) of the Rules of this Court. The issue involved in this case is of such magnitude that in order to protect the health, safety and welfare of their citizens, the States of Utah and Georgia file this brief.

QUESTION PRESENTED.

The primary question presented before this Court for decision is whether the Wisconsin Employment Relations Board, or the labor board of any state, may take jurisdiction of a labor matter which involves mass picketing, interference with the use of public streets, and intimidation of employees, or whether the jurisdiction of such subject matter lies exclusively in the National Labor Relations Board. More precisely, has the Taft-Hartley Act so preempted the field of labor relations that a state is denied jurisdiction of labor relations which involve actual or threatened violence to persons and property, public safety and order.

ARGUMENT

THE WISCONSIN SUPREME COURT CORRECTLY HELD THAT THE STATE OF WISCONSIN HAS JURISDICTION OVER SUCH MANIFESTATIONS OF LABOR RELATIONS AS MASS PICKETING, INTIMIDATION OF EMPLOYEES AND OBSTRUCTION OF STREETS.

This court has stated that in those fields of commerce where national uniformity is not essential, either the state or the federal government may act, and where there is a partial exercise of the commerce power by the federal government, a state may nevertheless legislate freely upon those areas of commerce which have been left unregulated by the federal government. *Cloverleaf Butter Company v. Patterson*, 315 U.S. 148 (1942). However, where the federal government exercises its commerce power so as to conflict with state regulations by express statute or implication, the federal legislation displaces the state power

and the federal government is said to have pre-empted the area in question.

In the case of *Kelly v. Washington*, 302 U.S. 1 (1937), Mr. Chief Justice Hughes, in writing the opinion of the court, stated:

> "Under our constitutional system, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. * * * *States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power.* And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. *The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by Federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together'* * * *." (Emphasis added)

An analysis of the relevant federal and state legislation indicates an absence of the irreconcilable conflict required to oust a state of jurisdiction over the subject matter in question. There is no express manifestation on the part of Congress in enacting the National Labor-Management Relations Act, the Taft-Hartley Act, 29 U.S.C.A. §141 et seq to exclude states from exerting their police power to deal with local exigencies. Nor is there

evidence that the federal administrative procedures are adequate to cope with local conduct which threatens public safety and order. To the contrary, the National Labor Relations Board has no express power or machinery to adequately prevent the infractions of public peace that result from mass picketing, threats of physical injury and property damage, and obstructions of public streets. Such activity demands immediate and "on the spot" policing, which the federal Board is impotent to provide. In view of the absence of express Congressional authority to exclude the states from exercising jurisdiction over the subject matter involved in this case, and the lack of preventive administrative procedure to adequately handle the problems so created, we submit that no conflict exists between the Taft Hartley Act and the Wisconsin Statutes, section 1106(2) (a) and (f), and therefore, the exercise of state police power is not superseded in this instance.

Our conviction that state power has not here been displaced is supported by precedent of this court. In the case of *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740 (1942) the court held that labor activity which involved "mass picketing, threatening employees desiring to work with physical injury or property damage, obstructing entrance to and egress from the company's factory, obstructing the streets and public roads surrounding the factory, and picketing the homes of employees" was a proper subject for state jurisdiction. The court stated:

> "* * * this Court has long insisted that an 'intention of Congress to exclude States from exerting their police power must be clearly manifested.' Napier v. Atlantic Coast Line R. Co., 272 U.S. 605, 611, 71 L. Ed. 432, 438, 47 S. Ct. 207, and cases cited; * * *. Congress

has not made such employee and union conduct as is involved in this case subject to regulation by the federal Board."

Although the court decided the *Allen-Bradley* case when the National Labor Relations Act, the Wagner Act, 29 U.S.C.A., Section 151 et seq. was in force, we submit that the 1947 amendment thereto, namely the National Labor-Management Relations Act, the Taft-Hartley Act, 29 U.S.C.A., Section 141 et seq. does not change the rationale and conclusion announced in that decision. Recent decisions of this court indicate that the labor activity involved in the *Allen-Bradley* case still remains a proper subject of state police power, and the interpretation by this court of the effect of Taft-Hartley legislation does not result in the displacement of state authority.

In the case of *International Union v. Wisconsin Employment Relations Board*, 336 U.S. 245, this court held that the State of Wisconsin could enjoin labor union activity that resulted in intermittent and unannounced work stoppages. In the course of the opinion, the court stated:

> *"However, as to coercive tactics in labor controversies, we have said of the National Labor Relations Act what is equally true of the Labor Management Act of 1947, that 'Congress designedly left open an area for state control' and that 'the intention of Congress to exclude the States from exercising their police power must be clearly manifested.'* Allen-Bradley Local, U.E.R.M.W. v. Wisconsin Employment Relations Bd., 315 U.S. 740, 749, 750, 86 L. Ed. 1154, 1164, 1165, 62 S. Ct. 820. We therefore turn to its legislation for evidence that Congress has clearly manifested an exclusion of the state power sought to be exercised in this case.

"Congress made in the National Labor Relations Act no express delegation of power to the Board to permit or forbid this particular union conduct, from which an exclusion of state power could be implied. The Labor Management Relations Act declared it to be an unfair labor practice for a union to induce or engage in a strike or concerted refusal to work where an object thereof is any of certain enumerated ones. * * * *Nevertheless the conduct here described is not forbidden by this Act and no proceeding is authorized by which the Federal Board may deal with it in any manner.* While the Federal Board is empowered to forbid a strike, when and because its purpose is one that the Federal Act made illegal, it has been given no power to forbid one because its method is illegal—even if the illegality were to consist of actual or threatened violence to persons or destruction of property. Policing of such conduct is left wholly to the states. *In this case there was also evidence of considerable injury to property and intimidation of other employees by threats and no one questions the state's power to police coercion by those methods.*

"It seems to us clear that this case falls within the rule announced in Allen-Bradley that the state may police these strike activities as it could police the strike activities there, because 'Congress has not made such employee and union conduct as is involved in this case subject to regulation by the federal Board.' *There is no existing or possible conflict or overlapping between the authority of the Federal and State Boards, because the Federal Board has no authority either to investigate, approve or forbid the union conduct in question.* This conduct is governable by the state or it is entirely ungoverned." (Emphasis added)

The injunction in the foregoing case was issued while the Wagner Act was still in force. Nevertheless the remedy continued after the Wagner Act was amended by the Taft-Hartley legislation.

In the case of *International Union of U.A.A. and A. v. O'Brien*, 339 U.S. 454 (1949), this court struck down a Michigan statute which regulated peaceful strikes, the basis for the decision being that the federal government had pre-empted the labor field in that area. In the course of its opinion the court distinguished the foregoing situation from that in *International Union v. Wisconsin Employment Relations Board*, supra, and the *Allen-Bradley* case, supra. The court's statement is as follows:

> "International Union, United Auto Workers v. Wisconsin Employment Relations Board, 336 U.S. 245, 93 L. Ed. 651, 69 S. Ct. 516 (1949), upon which Michigan principally relies, was not concerned with a traditional peaceful strike for higher wages. The employees' conduct there was 'a new technique for bringing pressure upon the employer,' a 'recurrent or intermittent unannounced stoppage of work to win unstated ends.' Id., 336 U.S. at 249, 264, 93 L. Ed. 660, 668, 69 S. Ct. 516. That activity we regarded as 'coercive,' similar to the sit-down strike held to fall outside the protection of the federal Act in National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U.S. 240, 83 L. Ed. 627, 59 S. Ct. 490, 123 A.L.R. 599 (1939), and to the labor violence held to be subject to state police control in Allen-Bradley Local, U.E.R.M.W. v. Wisconsin Employment Relations Board, 315 U.S. 740, 86 L. Ed. 1154, 62 S. Ct. 820 (1942). In the Wisconsin Auto Workers Case, we concluded that the union tactic was 'neither forbidden by federal statute nor was it legalized and approved thereby.' 336 U.S. at 265, 93 L. Ed. 669, 69 S. Ct. 516. 'There is no existing or possible conflict or overlapping between the authority of the Federal and State Boards, because the Federal Board has no authority either to investigate, approve or forbid the union conduct in question. This conduct is governable by the State or it is entirely ungoverned.'"

In 1953, this court decided the case of *Garner v. Teamsters Union*, 346 U.S. 485, and defined the jurisdiction retained by the states in the commerce field under the Taft-Hartley Act. The opinion stated in part:

> "The national Labor Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible.
>
> "This is not an instance of injurious conduct which the National Relations Board is without express power to prevent and which therefore either is 'governable by the State or it is entirely ungoverned.' In such cases we have declined to find an implied exclusion of state powers. International Union, U.A.W. v. Wisconsin Employment Relations Board, 336 U.S. 245, 254, 93 L. Ed. 651, 663, 69 S. Ct. 516. Nor is this a case of mass picketing, threatening of employees, obstructing streets and highways, or picketing homes. We have held that the state still may exercise 'its historic powers over such traditionally local matters as public safety and order and the use of streets and highways.' Allen-Bradley Local, U.E.R.M.W. v. Wisconsin Employment Relations Board, 315 U.S. 740, 749, 86 L. Ed. 1154, 1164, 62 S. Ct. 820. Nothing suggests that the activity enjoined threatened a probable breach of the state's peace or would call for extraordinary police measures by state or city authority."

The *Garner* decision therefore gives further recognition to the proposition that under the Taft-Hartley Act, a state may regulate and police labor activity similar to that involved in the *Allen-Bradley* case.

In *United Workers v. Laburnum*, 347 U.S. 656 (1954), this court quoted the *Garner* decision in reference to the

area of jurisdiction retained by the state in labor matters, and added:

> "The care we took in the Garner Case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself a recognition that if no conflict had existed, the state procedure would have survived."

In 1955 this court again considered the question of state-federal jurisdiction in the field of labor relations and announced in *Weber v. Anheuser-Busch*, 348 U.S. 468, that (1) a state may not prohibit the exercise of rights which the federal acts protect; (2) a state may not enjoin conduct under its own regulation that which has been made an "unfair labor practice" under federal regulation; (3) where the National Labor Relations Board has established the "machinery" for handling certification matters and the Board would use its own procedure if called upon, the state is excluded from certifying a union. In contrast to the foregoing prohibitions on the exercise of state jurisdiction, the court added:

> "4. On the other hand, in the following cases the authority which the State exercised was found not to have been exclusively absorbed by the federal enactments.
>
> "In Allen-Bradley Local v. Wisconsin Employment Relations Board, 315 U.S. 740, 86 L. Ed. 1154, 62 S. Ct. 820, the State was allowed to enjoin mass picketing, threats of bodily injury and property damage to employees, obstruction to streets and public roads, the blocking of entrance to and egress from a factory, and the picketing of employees' homes. The Court held that such conduct was not subject to regulation

by the federal Board either by prohibition or by protection."

From the foregoing authorities it can be seen that the Taft-Hartley Act was not interpreted as having pre-empted the field of labor relations where the labor conduct involved "mass picketing, threats of bodily injury and property damage to employees, obstruction of streets and public roads, the blocking of entrance to and egress from a factory, and the picketing of employees' homes." The Taft-Hartley Act does not expressly, nor by implication, make provision for the prevention of conduct involved in the case at bar nor does it provide the machinery for adequately handling the abuses that may arise through this type of activity.

In *Garner v. Teamsters' Union*, supra, this court was disturbed because of the potential conflict that might arise between state and federal governments were state jurisdiction allowed in areas covered by federal legislation. The same problem was presented in *Bethlehem Steel Corporation v. New York Labor Relations Board*, 330 U.S. 767 (1946); *LaCross Telephone Corporation v. W. E. R. B.*, 336 U.S. 18 (1949); and in *Plankinton Packing Company v. W. E. R. B.*, 338 U.S. 953 (1953). Federal pre-emption was implied in those cases because of the conflict which resulted when the federal and state governments both took hold of the same subject matter.

The case of *Kelly v. Washington*, supra, emphasized the proposition that a state may exercise its police power, even though interstate commerce is affected, if the federal government has not acted in such a way as to suspend the state regulatory power. The state police power is super-

seded only if it conflicts with the federal power in a direct and positive manner. In the case at hand, we find no irreconciliable conflict. The federal government has not seen fit to enact legislation dealing with labor relations which involve the "traditionally local matters as public safety and order" presented here. As we have pointed out, this court has consistently referred to the *Allen-Bradley* fact situation as an area where state jurisdiction has not been superseded by federal action. Such reaffirmance has come since the Taft-Hartley Act of 1947.

It is submitted that there is sufficient precedent to sustain the position of appellees in this case. Of equal persuasion, however, is the policy consideration involved. Public welfare, health and safety have everything to gain by preserving state jurisdiction in the case at bar. The peculiar labor activities in question involve manifestations of violence and coercion, highly disruptive of public peace. Non-regulation of such activity is a source of real concern to a local community. Law and order in the field of labor relations has been the prime objective of both state and federal legislation, and harmony between labor and management can result only from an application of law and order.

For this court to hold that a state may not exercise jurisdiction over the subject matter presented here would precipitate conflict in the field of labor relations and permit disruptive practices to go unregulated. Such a conclusion would produce a retrogression of labor-management negotiation, with resultant permanent harm reflected in the lives and property of the citizens of a community.

CONCLUSION

In view of the authorities cited and the reasons advanced, we respectfully submit that the decision of the Supreme Court of Wisconsin should be affirmed.

Respectfully submitted,

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